

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**JAMES A. HULL, and
TERESA G. HULL,**

Debtors.

Case No. **05-64124-13**

MEMORANDUM OF DECISION

At Butte in said District this 27th day of December, 2005.

In this Chapter 13 case hearing was held at Missoula after due notice on December 8, 2005, on confirmation of the Debtors' Chapter 13 Plan and objection thereto filed by the Chapter 13 Trustee. Debtors James A. Hull ("James") and Teresa G. Hull ("Teresa") filed an amended Chapter 13 Plan on December 7, 2005, and both appeared and testified at the hearing represented by attorney Gregory E. Paskell ("Paskell"). The Chapter 13 Trustee Robert G. Drummond appeared in opposition to confirmation. No exhibits were admitted. The Trustee stated that his sole remaining objection to confirmation is based on 11 U.S.C. § 1325(a)(4), the "best interests of creditors", since the Debtors' Amended Plan fails to pay the amount of the Debtors' nonexempt equity in their residence to creditors based on the value Debtors listed in their Schedule A. At the conclusion of the parties' cases-in-chief the Court took the matter under advisement. After review of the record and applicable law, the Trustee's objection to confirmation based on the "best interest of creditors" test will be sustained by separate Order, and Debtors will be given one final opportunity to propose a confirmable Plan.

This Court has exclusive jurisdiction of this Chapter 13 bankruptcy case under 28 U.S.C. 1334(a). Confirmation of a Chapter 13 plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L). This Memorandum includes the Court's findings of fact and conclusions of law. At issue is whether the Debtors satisfied the "best interest of creditors" test of § 1325(a)(4) when they attempted to satisfy the Trustee's objection by changing the valuation of their residence at the hearing. This Court concludes that the Debtors failed to cure the Trustee's objection by changing the valuation of their residence at the hearing to eliminate their equity.

FACTS

Debtors James and Teresa Hull purchased their residence at 201 Mallard Loop in Whitefish, Montana, in the Fall of 2002, at a purchase price of \$136,000. The residence consists of a 2,000 square foot house and more than two (2) acres of land. Debtors testified that their residence was a rental before they purchased it, that it does not have a finished basement and is in fair condition but needs some repair. It is among the smaller homes in their neighborhood and is encumbered by a mortgage to Wells Fargo Bank, N.A. ("Wells Fargo"). James testified that the amount of mortgage is about \$146,000, but Wells Fargo filed Proof of Claim No. 9 on December 2, 2005, asserting a secured claim in the amount of \$151,333.79 secured by a deed of trust on Debtors' residence.

Debtors filed their Chapter 13 bankruptcy petition on October 10, 2005, and filed their Schedules late on October 26, 2005. At Schedule A Debtors list the "current value" of their interest in their residence, described as Lot 72 of Country Lake Homes Phase I in Flathead County, Montana, in the amount of \$328,800.00. James and Teresa both signed their Declaration concerning Schedules on October 26, 2005, declaring "under penalty of perjury that I have read

the foregoing summary and schedules . . . and that they are true and correct to the best of my knowledge, information and belief.”

James testified that they listed the current value of their residence at \$328,800.00 after consultation with real estate agents, and that they were going to list the property for sale at that price. Teresa also testified that they arrived at the \$328,800.00 value from conversations with real estate agents. She testified that their residence needs some work, but admitted that they have cleaned up the property and made some improvements. Teresa stated that they would need to perform more work on their property before it would sell for \$328,800.00.

Debtors filed their Chapter 13 Plan on October 26, 2005, proposing 60 monthly payments in the sum of \$260.00. The Chapter 13 Trustee filed objections on November 23, 2005, including that the Plan fails to satisfy the “best interest of creditors” test because paragraph 2(f) provides that there will be no distribution to unsecured creditors of the Debtors’ nonexempt¹ equity in their real property, which is shown by their original Schedule A as \$78,174.85². Wells Fargo also filed an objection to confirmation because the Plan did not pay its full arrearage.

Debtors amended their Plan on December 7, 2005, the day before the confirmation hearing, to correct the arrearage amount to Wells Fargo and provide that all tax refunds would be distributed to unsecured creditors. They also amended their Schedule B. The Trustee filed on the same date another objection that the amended Plan fails to satisfy § 1325(a)(4) because it does not pay non-exempt equity in Debtors’ home to unsecured creditors.

¹Debtors’ Schedule C lists a \$100,000 exemption in their homestead, to which no objection has been filed.

²Schedule A lists the homestead current value as \$328,800.00 and the only secured claim as \$150,625.15. The difference is \$178,174.85, which leaves non-exempt equity of \$78,174.85.

Teresa testified that she was called by her attorney Paskell's office the day before the confirmation hearing and told to look again into the value of her residence because, she was told, there was a problem with the value. Teresa works as an administrative assistant in a real estate office. She testified that she went into the multiple listing service and looked at comparable sales in her neighborhood. Based upon the small size of Debtors house in their subdivision and its need for additional work, Teresa testified that she came up with a new value of between \$240,000 to \$250,000. Under questioning by the Court Teresa testified that if Debtors were listing their property they would list it for \$250,000. When asked about the \$328,800 current value they listed in their original Schedule A, Teresa testified that they would have to do more work to sell the house for \$328,800.

The Court took the matter under advisement at the hearing. After the hearing, at 12:14 p.m. on December 8, 2005, Paskell filed an amendment to Debtors' Schedule A lowering the current value of their property to \$248,000.00.

DISCUSSION

It is well established law in this Circuit that for a bankruptcy court to confirm a plan, each of the requirements of section 1325 *must be present* and the debtor has the burden of proving that each element has been met. *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1994); *In re Andrews*, 49 F.3d 1404, 1408 (9th Cir. 1995); *Chinichian v. Campolongo*, 784 F.2d 1440, 1443-44 (9th Cir.1986) (citing *In re Elkind*, 11 B.R. 473, 476 (Bankr.D.Colo.1981)) (emphasis added); *Accord 550 West Ina Rd. Trust v. Tucker*, 989 F.2d 328, 330 (9th Cir.1993); *Downey Sav. and Loan Ass'n v. Metz*, 820 F.2d 1495, 1496 (9th Cir.1987). *See also In re Pearson*, 10 B.R. 189, 194 (Bankr.E.D.N.Y.1981).

The Trustee's objection to confirmation contends that Debtors' amended Plan fails to meet the requirements of § 1325(a)(4)³ because the non-exempt equity in their homestead is not paid to unsecured creditors. In a Chapter 13 case, the payments to unsecured creditors required under § 1325(a)(4) must equal or exceed the amount that the creditors would receive under chapter 7. *In re Osborne*, 76 F.3d 306, 310 (9th Cir. 1996). The best interest test of § 1325(a)(4) forbids confirmation of a plan that pays unsecured creditors less than they would receive in a Chapter 7 liquidation. *In re Cohen*, 305 B.R. 886, 896-97 (9th Cir. BAP 2004).

Based on the Debtors' value of their homestead they placed on their original Schedule A of \$328,800, the Court finds that the Trustee's objection based on the "best interest of creditors" test, § 1325(a)(4), is well taken and must be sustained. The difference between that value and Wells Fargo's claim of \$150,625.15 on the same Schedule is \$178,174.85, which leaves non-exempt equity of \$78,174.85 after deducting Debtors' \$100,000 homestead exemption. Debtors' Amended Plan does not provide for any payment of non-exempt equity, and thus they fail their burden of proof to show that their Amended Plan satisfies § 1325(a)(4). Debtors' amended Schedule A was not filed until after the hearing on confirmation concluded and is not part of the record, and the Court will not consider it or the reduced value stated therein.

Any reasonable or even cursory review of Debtors' original Schedule A, which by itself disclosed the \$308,800 value of their real property and \$150,625.15 secured claim encumbering it, should have alerted Debtors' counsel of the need for the plan to provide for payment to

³Section 1325(a)(4) provides that a court shall confirm a plan if — "(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date."

unsecured creditors of the amount of non-exempt equity to satisfy § 1325(a)(4), or to otherwise address that problem. Debtors' attorney is an experienced bankruptcy practitioner. Debtors' original Plan, filed by Paskell on the same date as he filed Debtors' Schedules, proposes to pay \$0 to unsecured creditors.

The Trustee's first objection to confirmation was filed November 23, 2005, more than two weeks before the confirmation hearing, and specifically cites § 1325(a)(4) and the failure to pay unsecured creditors the amount of non-exempt equity. Nothing in response was done by Debtors until the day before the confirmation hearing when Paskell's office called Teresa and told her to come up with another valuation. Paskell filed the amended Plan on the day before the confirmation hearing, and the Trustee immediately filed an objection repeating the § 1325(a)(4) objection of two weeks before, which Debtors failed to address in their Amended Plan other than by promising future tax refunds.

Debtors attempt to cure the Trustee's objection, not by increasing their plan payments to pay their nonexempt equity, but instead by changing their opinion of the value of their real property based upon Teresa's examination of comparable sales on the day before the confirmation hearing. Teresa admitted that her attorney's office called her the day before the confirmation hearing and told her to investigate a new value.

Ordinarily an owner is competent to give his or her opinion on the value of his or her property, by most often stating the conclusion of value without stating a reason. *See* Hon. Barry Russell, BANKRUPTCY EVIDENCE MANUAL, 2000 ed. § 701.2; *South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Tex.*, 614 F.2d 1056, 1061 (5th Cir. 1980). However, while a debtor's estimate of value may be acceptable in certain cases, the Court may

give little weight to an opinion if not based upon sufficient facts. *In re Plummer*, 20 Mont. B.R. 468, 478 (Bankr. D. Mont. 2003); *In re Hungerford*, 19 Mont. B.R. 103, 118-19 (Bankr. D. Mont. 2001).

In the instant case the Court gives little weight to Debtors' \$250,000 value opinion given at trial based on Teresa's investigation the day before. Neither Debtor was admitted to testify as an expert in real estate valuation, and while Teresa is employed at a real estate office she is an administrative assistant, not a licensed realtor. Furthermore, the \$250,000 value is contradicted by Debtors' own Schedule A, in which they swore under penalty of perjury that the value of their real property is \$328,800. This self contradiction undermines Debtors' credibility and weighs against their satisfying their burden of proof. Debtors further contradict themselves when Teresa explained that the lower value reflects work which remains to be done before the property could be sold for \$308,000.00. But the same or even more work was undone at the time Debtors filed their Schedule A on October 26, 2005, stating under penalty of perjury that the "current value" was \$328,800.00.

Finally, the timing of Debtors' new valuation raises suspicions and undermines Teresa's \$250,000 value opinion and the weight assigned thereto by the Court. The Trustee put Debtors on notice on November 23, 2005, of his "best interest of creditors" objection but they did nothing for two weeks to address the Trustee's objection until the day before the hearing on confirmation, notice of which went out on October 11, 2005. For these reasons the Court rejects Debtors' \$250,000 value testimony and finds that the value of their real property is their own value of \$328,800⁴. As a result, the Trustee's § 1325(a)(4) objection is well taken and must be sustained

⁴Debtors are allowed liberal amendment of their schedules under F.R.B.P. 1009(a). However: "A court may, however, deny the debtors leave to amend 'on a showing of a debtor's bad faith or of prejudice to creditors'." *In re Michael*, 17 Mont. B.R. 192, 198, 163 F.3d 526, 529 (9th Cir. 1998), quoting *In re Doan*, 672 F.2d 831, 833 (11th Cir. 1982) (per curiam).

because Debtors' Amended Plan fails to pay unsecured creditors the nonexempt equity in their residence. The Court concludes that the Debtors failed to satisfy their burden of proving that the "best interest of creditors" element of § 1325(a)(4) has been met. *In re Barnes*, 32 F.3d at 407.

IT IS ORDERED a separate Order shall be entered in conformity with the above sustaining the Trustee's "best interest of creditors" objection to confirmation based on 11 U.S.C. § 1325(a)(4) and denying confirmation of the Debtors' Chapter 13 Plan filed December 7, 2005; Debtors will be granted until January 6, 2006, to file an amended Plan curing the Trustee's objection or this case may be dismissed or converted to Chapter 7 without further notice or hearing, and if an amended plan is timely filed the final hearing on confirmation will be held on January 12, 2005, at 10:00 a.m., in Missoula, Montana.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana

Debtors' attempted amendment of their Schedule A would reduce the current value of their real property to \$248,000, and completely eliminate the non-exempt equity of \$78,174.85 which must be paid to unsecured creditors under § 1325(a)(4). Such a result clearly would prejudice unsecured creditors, and therefore based upon *Michael* this Court will disregard the \$248,000 value listed in Debtors' Amended Schedule A in future proceedings, unless Debtors submit a written appraisal and sworn testimony of an MAI appraiser at the confirmation hearing.